# COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.00 PER ANNUM. 30 CENTS PER NUMBER



# NOTES.

ADMISSION OF FOREIGN CORPORATIONS UPON CONDITIONS OUSTING FEDERAL COURTS OF JURISDICTION.—In the leading case of *Bank of Augusta* v. *Earle* (1839) 13 Pet. 519, it was established that a corporation cannot exist outside the State in which it is incorporated, and, although its agents can act elsewhere, they can do so only with the consent of the State in which they act. *Paul* v. *Virginia* (1868) 8 Wall. 168; *Hooper* v. *California* (1894) 155 U. S. 648. Most States have found it advisable to impose conditions upon foreign corporations before admitting them, and insurance companies have been especially subjected to such regulation. In order to place them as much as possible upon the same footing as domestic corporations, they are frequently required to stipulate, as a condition precedent to obtaining a license, not to sue in, or remove any suit to, a federal court, on the ground of diversity of citizenship, local prejudice or other basis of federal jurisdiction. In *Home Ins. Co.* v. *Morse* (1874) 20 Wall. 445, an agreement under such a statute not to sue in a federal court, was held unenforceable and the statute void as ousting the federal courts of jurisdiction. It was held that although a state may admit upon condition, it may not make the condition repugnant to the federal Constitution. *Southern Pac. Co.* v. *Denton* (1892) 146 U. S. 202; *Blake* v. *McClung* (1898) 172 U. S. 239, 254; compare: *Allgeyer* v. *Louisiana* (1897) 165 U. S. 578; *McCall* v. *California* (1889) 136 U. S. 104. This position was reaffirmed in *Barron* v. *Burnside* (1887) 121 U. S. 186, where a similar statute was held unconstitutional and an agent who had been arrested for its violation was released. *Comm.* v. *E. Tenn. Coal Co.* (1895) 97 Ky. 238. A recent case in Kentucky has, however, raised an interesting question;

*Travellers' Ins. Co.* v. *Prewitt, Ins. Commr.* (1904) 83 S. W. 611; in this case the insurance company had removed a suit to the federal circuit court, whereupon the insurance commissioner, under a statute which made it his duty to revoke the authority if the company took this action, threatened to revoke the license of the insurance company to do business in Kentucky. The court, following *Doyle* v. *Cont. Ins. Co.* (1876) 94 U. S. 535, held that while the statute imposing the condition might be void—indeed, a similar one had been so held by the same court, *Comm.* v. *E. Tenn. Coal Co.*, supra,—nevertheless the commissioner could not be enjoined from revoking the license. The position of the court was that the State has the absolute right to exclude and conversely it may admit upon whatever conditions it wishes to impose; that if any of these conditions is unconstitutional an agreement to observe it cannot be enforced, *Morse* v. *Ins. Co.*, supra, but that the State may nevertheless revoke the license and exclude the company; its motive for so doing cannot be inquired into. Having the power to revoke for no reason it may revoke for a bad reason. If it cannot impose any condition at all then has it not absolute power to exclude. 6 Thomp. Corp. §§ 7466–7467.

There can be no question that this position is strictly within the holding of the United States Supreme Court in *Doyle* v. *Ins. Co.* supra, and it seems that the latter case, although distinguished and questioned, Beale, Foreign Corporations, § 122; *Cable* v. *U. S. Life Ins. Co.* (1903) 191 U. S. 288, 307, is still law. It has been suggested, however, that the contrary result could have been more consistently reached in that case. The right to exclude does not include the right to admit upon any condition. A has the right to refuse to receive B as tenant, and yet it does not follow that he may admit him upon condition that he rob C; BRADLEY, J., dissenting, *Doyle* v. *Ins. Co.*, supra; the Congress has the power to refuse, arbitrarily, to admit new States, but it does not follow that it can admit a State with rights different from those possessed by the other States. See Cong. Debates upon admission of Missouri: Annals XV and XVI Cong. 1818–1820; Cooley, Const. Lim., 7th ed., 58–59. Moreover, admitting that a sovereign state could withdraw the license for no reason, an agent can do so only when authorized by statute. To hold otherwise assumes the act of the agent to be the act of the State, whereas the agent represents the State only when acting within constitutional limits. The act of exclusion in both the Doyle and the principal case was threatened by an agent of the State, who derived his authority to act from a statute unconstitutional either wholly or in part. If wholly void he acts without authority; if separable, and unconstitutional in part only, his authority to revoke would still be confined to causes set forth in the part which was constitutional, and with the provisions of this portion the company has complied. In the absence of statutory provisions to the contrary, the consent of each State is presumed to exist by the common-law of comity between nations. *Bateman* v. *Service* (1881) L. R. 6 A. C. 386; *Bank of Augusta* v. *Earle*, supra; *Williams* v. *Creswell* (1876) 51 Miss. 817; *People* ex rel. *Stevens* v. *Fidelity, etc., Co.* (1894) 153 Ill. 25. This law is not discretionary with the court but is found and administered as is any other principle of law. Story, Conflict of Laws,

8th ed., § 35; 2 Morawetz Corp., 2nd ed., § 962. An unconstitutional enactment being void, and no other statute having conferred authority on the agent of the State to act, it would seem to follow that the right of the insurance company to continue acting within Kentucky was protected by the common law, and the agent should be enjoined to prevent injury to rights already vested under former constitutional legislation. *Niagara Fire Ins. Co.* v. *Cornell* (1901) 110 Fed. 816. This is not a denial of the absolute power of the State to exclude foreign corporations, but an insistence upon the right of a foreign corporation, once admitted, to remain until properly expelled.

---

CONSPIRACY AS A TORT.—Whether conspiracy exists as an independent tort is still a much mooted question, and the courts and text-writers seem fairly evenly divided. DWIGHT, C., in *Place* v. *Minster* (1875) 65 N. Y. 89, defines conspiracy, so far as it justifies a civil action for damages, as "a concert or combination to defraud or to cause other injury to person or property, which actually results in damage to the person injured or defrauded," and this definition clearly states the position of the authorities favoring the existence of conspiracy as a substantive wrong. *Griffith* v. *Ogle* (Pa. 1806) 1 Binney 172; *Gregory* v. *Duke of Brunswick* (1843) 6 Scott N. S. 809; *Raleigh* v. *Cook* (1883) 60 Tex. 438; Bishop Non-Contract Law, §362; Addison, Torts, 3d ed., 589. But, on the other hand, there is considerable judicial opinion to the effect that a conspiracy gives rise to no distinct right of action. According to this view the concert or combination is not the gravamen of the action, but may be introduced only in aggravation of damages. *Hutchins* v. *Hutchins* (N. Y. 1845) 7 Hill 107; *Parker* v. *Huntington* (Mass. 1854) 2 Gray 124; *Van Horn* v. *Van Horn* (1890) 52 N. J. L. 284; Pollock on Torts, 5th ed., 304. In a recent case in the Appellate Division of the Supreme Court of New York this question was raised by a demurrer for misjoinder of causes of action. The complaint alleged a conspiracy on the part of the defendants and set out slander, malicious prosecution and abuse of process as overt acts committed in pursuance of the agreement. The Court overruled the demurrer. *Green* v. *Davies* (1905) 91 N. Y. Supp. 470.

As an indictable offense conspiracy was recognized at common law from the earliest times, *State* v. *Buchanan* (Md. 1821) 5 Har. & J. 317, and even though an act might not be indictable if done by an individual, a combination to do that act was held to be indictable. *Timberly & Childe* (1662) 1 Sid. 68; *Rex* v. *Journeymen Tailors* (1721) 8 Mod. 11. The civil action of the early common law was under a writ of conspiracy; but this writ was allowable only in cases of conspiracy to have a man indicted for treason or for a felony punishable with death, 2 Selw. N. P. 806, and its operation was thus confined until the statute 21 Ed. I was enacted, which greatly enlarged the scope of private remedies against conspirators. The action under this statute was in the form of an action on the case. Under it civil actions were extended to all cases for which a criminal indictment would lie, provided the plaintiff had sustained actual damage (Archbold's N. P. 594), and the effect of the statute seems